Nos. 11,320 and 11,321

United States Circuit Court of Appeals

For the Ninth Circuit

Pope & Talbot, Inc., a corporation,
Appellant,

vs.

Guernsey-Westbrook Company, a corporation,
Appellee.

Pope & Talbot, Inc., a corporation,
Appellant,

vs.

Blanchard Lumber Company of Seattle, a corporation,
Appellee.

BRIEF FOR APPELLEES

Farnham P. Griffiths
Charles E. Finney
Martha T. Naylor
McCutchen, Thomas, Matthew,
Griffiths & Greene
1500 Balfour Building,
San Francisco 4, California,
Attorneys and Proctors for Appellees.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

The Appellant, Pope & Talbot, Inc., sold lumber to Appellee Guernsey-Westbrook Company and to Appellee Blanchard Lumber Company for transportation on the Absaroka, owned and operated by Appellant. Appellant

contends that it is entitled to the freight it was to earn for transporting the lumber from St. Helens, Oregon, to Brooklyn, New York, and Philadelphia, Pennsylvania, notwithstanding the lumber was discharged at San Pedro, California. The vessel put into port at San Pedro for repairs after being torpedoed by a Japanese submarine. Appellant thereafter gave notice of abandonment of the voyage which Appellees protested. Appellant contends that it was justified in abandoning the voyage and entitled to full freight notwithstanding the abandonment by reason of an earned freight clause in the bills of lading under which the lumber was shipped.

Following the abandonment of the voyage the lumber was sold pursuant to agreement, without prejudice to the rights of Appellees to maintain that the voyage had been wrongfully abandoned and that no freight was due (Tr. of Rec., p. 27; Apostles on App., p. 29). From the proceeds of sale Pope & Talbot, Inc. deducted the full freight for transportation from St. Helens, Oregon, to the east coast ports to which the lumber was consigned. To recover the amounts withheld for freight the Appellee Guernsey-Westbrook Company brought suit on the law side of the court and Appellee Blanchard Lumber Company filed a libel in Admiralty. The cases were tried together. Judgment was rendered for Guernsey-Westbrook Company for $10,543.85 and in favor of Blanchard Lumber Company for $4,296.13.

The trial court held that Pope & Talbot, Inc. was without justification in abandoning the voyage at San Pedro and for that reason not entitled to freight under the earned freight clause in the bills of lading. The trial court further held in the case in which Guernsey-West-

brook Company was plaintiff that under an express provision in the contracts of sale no freight was due unless the lumber reached Brooklyn. The contracts provided "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER." The question as to the interpretation of this provision is involved only in the case in which Guernsey-Westbrook Company is plaintiff.

The trial court rejected the further contention of Appellees that no freight was due under the earned freight clause in the bills of lading for the reason that the clause was optional and the option had not in fact been exercised before the vessel was torpedoed. Having rejected this contention, the trial court permitted Pope & Talbot, Inc. to retain $26.59, which represented freight on that portion of the lumber purchased by Blanchard Lumber Company which had been washed overboard and never recovered. As to that lumber Appellant could not lose its right to freight by failure to resume the voyage. A similar allowance was not made in the Guernsey-Westbrook Company case because the court construed the provision in the contracts for the sale of the lumber—"OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER"—as making liability for freight conditional upon the arrival of the lumber in Brooklyn.

In a footnote on page 6 of its brief Appellant says that the question whether the earned freight clause was optional "is not involved in this appeal." Appellant is under a misapprehension. The trial court decided this point against the Appellees. But if this court is of the view that the judgment can be affirmed only on the ground that the earned freight clause was optional, then Appellees are

entitled to an affirmance on that ground and, indeed, under the decision in *The John Twohy* (1921) 255 U. S. 77 the Appellee Blanchard Lumber Company would be entitled to a reversal of the judgment in so far as it permitted Pope & Talbot, Inc. to retain the sum of $26.59. In the cited case it was held that upon an appeal by a party to an admiralty suit the nonappealing party may challenge the judgment in so far as it is adverse to him. Certainly, then, a nonappealing party may support a judgment in its favor on any ground presented by the record of proceedings in the trial court.

Appellee Blanchard Lumber Company would not presume to take the time of this court in consideration of an item so small as $26.59. Appellees do urge, however, that the question of the optional character of the earned freight clause has not been eliminated from these cases; that if this court should be of the view that the trial court erred in the points decided in favor of Appellees then this court must consider whether Appellees are entitled to an affirmance on the ground, as contended for by them, that the earned freight clause was optional.

ARGUMENT

I.

IN THE GUERNSEY-WESTBROOK COMPANY CASE AN EXPRESS PROVISION OF THE CONTRACTS UNDER WHICH THE LUMBER WAS SOLD PRECLUDES APPELLANT FROM RELYING ON THE EARNED FREIGHT CLAUSE IN THE BILLS OF LADING.

As appears from the facts stated in Appellant's brief, Orders for lumber received from Guernsey-Westbrook Company and Acceptances thereof executed by Pope & Talbot, Inc. together constituted contracts for the sale of lumber. The Acceptance included provisions as follows:

> "PRICES AS NOTED ABOVE PER M′ B.M.C.I.F. END OF SHIP'S SLINGS BROOKLYN, N.Y. TERMS: OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER: BALANCE 98% SIGHT DRAFT WITH DOCUMENTS ATTACHED, INCLUDING NEGOTIABLE BILL OF LADING TO ORDER OF MARINE MIDLAND TRUST CO. OF NEW YORK."

The letters M′B.M. are an abbreviation for thousands of feet board measure. The TERMS provision quoted above appears also on the invoices for the lumber sold Guernsey-Westbrook Company. On the reverse side of the Acceptance are printed "TERMS AND CONDITIONS OF SALE", A - G. E provides:

> "E. Any government tax, state or federal, or any change in freight rate effective after date of this order and before shipment shall be for purchaser's account."

On the invoices is the typed statement:

> "Price based on existing ocean freight rate of \$16.00 per M′ net."

F is as follows:

> "F. In the case of intercoastal shipments all terms of the steamship bill of lading are made a part of this contract."

Although the Acceptances contemplated shipment in a vessel of Appellant, the Absaroka or West Portal, the bills of lading which Appellant proposed to use for shipping the lumber are not set forth nor otherwise identified than by the reference in E of the terms and conditions of sale.

The earned freight clause of the bills of lading is as follows:

> "Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost. * * *." (Exhibit 1 to Pre-trial Stipulation in case No. 11320 and case No. 11321.)

The Pretrial Order recited that prior to the commencement of the voyage Pope & Talbot, Inc. secured sufficient marine and war risk insurance to cover all freight on all cargo on the Absaroka (Tr. of Rec., p. 28; Apostles on App., p. 31). The printed Transcript of Record, page 33, erroneously sets forth the District Court's Memorandum Opinion and Order for Judgment to read: "To cover all freight *and* all cargo on board the Absaroka.")

It is our position that the provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" makes arrival of the goods a condition precedent to liability for freight; that unless the goods arrive at destination no freight is due; that in so far as the printed earned freight clause of the bills of lading is in conflict with the typed provision of the Acceptances the Acceptance provision prevails.

The trial court held that the Acceptance provision was ambiguous; that in the light of settled rules of construction, to which reference will be made hereafter, the provision should be construed as contended for by Appellees; that the earned freight clause of the bills of lading was in conflict with the Acceptance provision as thus construed; and that under the decision in *Toyo Kisen Kaisha v. W. R. Grace Co.* (C.C.A. 9, 1931) 53 F. 2d 740, the Acceptance provision prevailed.

A.

It Does Not Follow From the Fact That the Sales Were on C.I.F. Terms That Appellant Is Entitled to Freight.

Where the carrier fails to deliver the goods at destination neither seller nor carrier is entitled to freight from

the buyer solely by virtue of the fact that the sale is on c.i.f. terms.

Pope & Talbot, Inc. seems to contend in this court, as it did in the trial court, that the circumstance that the sales to Guernsey-Westbrook Company were described as c.i.f. sales in the Acceptances supports its position that it is entitled to freight, although the lumber was not transported to destination. On page 10 of its brief Appellant says:

> "These cases support the position * * * that the buyer, under a C.I.F. contract, not only has the risk of loss of goods in transit (for which insurance is taken out in his name), but also, as between buyer and seller, has the obligation to pay the freight charges irrespective of delivery".

On page 11 Appellant says that the decision of the District Court "that delivery was a necessary condition to the payment by the buyer of the freight charges" is "contrary to the rule in c.i.f. sales". This contention calls for an analysis of c.i.f. sales. In the present case Pope & Talbot, Inc. appears in the dual capacity of seller and carrier. Let us first consider the relationship between buyer and seller under a c.i.f. sale where the seller is not also the carrier.

Where a sale is on c.i.f. terms the price quoted includes charges for insurance and freight. The seller procures and pays for insurance to protect the buyer and arranges for transportation. The seller either prepays the freight or, if the goods are shipped collect, freight to be paid by the purchaser on arrival, the charge for freight is deducted from the amount payable to the seller by the purchaser. It is usually provided in the contract of sale that

payment of the purchase price (less freight where the goods are shipped collect) is to be made against documents, which are likely to reach the buyer before the goods. These and other general principles concerning sales on c.i.f. terms are discussed in

Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co. (C.C.A. 2, 1945) 147 F. (2d) 399, 402;

Gamboa, Rodriguez, Rivera & Co., Inc. v. Imperial Sugar Co. (C.C.A. 5, 1942) 125 F. (2d) 970, 971;

Warner Bros. & Co. v. Israel (C.C.A. 2, 1939) 101 F. (2d) 59, 60;

1 *Williston on Sales* (2nd ed.), pp. 605-617, §§ 280c-280f;

Vold on Sales, pp. 216-223;

32 *Yale Law Journal* 711;

7 *Words and Phrases* 169.

In the ordinary c.i.f. sale where the seller is not also the carrier the risk of loss during transportation is on the purchaser, in whom title vests on delivery to the carrier. The purchaser must pay the seller for the goods, notwithstanding their loss en route or nondelivery at destination. (Authorities cited supra.) But the carrier will not be entitled to freight where the cargo is not delivered at destination unless the contract of affreightment which the seller has made with the carrier includes an earned freight clause or a provision of like import. And where the goods sold under c.i.f. contract have been shipped freight collect, if the carrier is not entitled to freight the buyer is not liable therefor to the seller. As between buyer and seller where freight has been prepaid by the seller it may well be that the buyer must pay the seller the full purchase price,

including freight, leaving the buyer to assert against the carrier any claim for return of prepaid freight arising from the carrier's failure to make delivery.

If the bill of lading includes an earned freight clause, but as between seller and buyer the seller was not authorized to arrange for transportation on such terms, the carrier nevertheless may have a right to freight as against the seller under its contract made with the seller for the transportation of the goods. But as between the buyer and the seller it would seem clear that the buyer is not liable for freight on the undelivered shipment where the earned freight clause was unauthorized and probably not liable for any part of the purchase price, since the seller did not conform to the contract of sale. (1 *Williston on Sales* (2d Ed.), p. 616; *Vold on Sales*, pp. 219-220.)

The purpose of the above discussion is to make it plain that it is not an incident of a c.i.f. sale that the *carrier* is entitled to freight notwithstanding the goods are not delivered at destination, nor that the *seller* is entitled to receive the full purchase price from the buyer in such event without deduction for freight. The carrier's right to freight will depend on whether the contract of affreightment gives it that right notwithstanding nondelivery. The buyer's liability to the seller for the full purchase price, including freight, will depend on whether the carrier is entitled to freight under the contract of affreightment and on whether, as between buyer and seller, the seller was authorized to arrange for transportation on such terms.

We have said above that in the absence of a special provision in the contract of affreightment the carrier who fails to deliver cargo at destination will not be entitled

to freight. C.i.f. contracts were first used in England (1 *Williston on Sales* (2d ed.) 605). The decision in *Ireland v. Livingston*, L.R. 5, H.L. 395 (1872) is widely cited in general discussions of c.i.f. contracts. In that case it is said:

> "The terms at a price 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee, which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board, he will have to pay the freight, which will make up the amount he has engaged to pay. *Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight,* and he will recover the amount of his interest in the goods under the policy. If the nondelivery is in consequence of some misconduct on the part of the master or mariners not covered by the policy, he will recover it from the shipowner." (Italics added.)

For the proposition that the seller has no right to freight if the carrier is not entitled to freight we need only refer to *Gamboa, Rodriguez, Rivera & Co., Inc. v. Imperial Sugar Co.* (C.C.A. 5, 1942) 125 F. 2d 970, certiorari denied 316 U.S. 691, 86 L. Ed. 1762, cited by Appellant. The seller of sugar under a c.i.f. contract shipped the

sugar from the Philippine Island for Galveston, Texas on three German vessels, which put into ports short of destination and discharged the sugar upon the outbreak of the war. In order to obtain possession of the sugar for transshipment the buyer, upon demand of the carrier, paid full freight to destination. Both the seller and the buyer filed libels against the carrier to recover freight paid by the buyer. The carrier conceded its obligation to refund the freight and deposited $32,541.75 in court. Judgment for the buyer was affirmed. Had the seller been entitled to freight notwithstanding nondelivery judgment would have been for the seller.

In deciding for the buyer the court said:

> "Appellant's position will not be sustained. Gamboa has, in fact, realized every cent it expected to receive or to which it was entitled under the contract. It has been paid for the sugar and the insurance, and has been relieved of its freight obligations. When it shipped the sugar, and forwarded the proper documents to Imperial, its obligations under the contract were at an end. From that moment the buyer alone stood to lose on the ventures. The buyer, Imperial, was the one who was interested in receiving the sugar at its agreed destination, and when the voyages were broken up, it paid the freight charges, and it with the insurance carriers suffered the expense, risk, and inconvenience incident to the transshipment of the undelivered cargoes. No cases are cited, and we have found none dealing with a situation of this kind, but we think that the principles of fair play and justice sustain the judgment awarding the contested sum to Imperial."

The above discussion has been directed more particularly to the situation where the seller is not also the carrier,

as in the Guernsey-Westbrook case here involved. It has been pointed out that the rule is that under a c.i.f. sale the risk of loss during transportation is on the purchaser. Where the c.i.f. seller is also the carrier by water it assumes obligations during transportation which to a degree are controlled by statute, the Harter Act (46 U.S.C.A., §§ 191-195) where the shipment is in domestic trade and the Carriage of Goods by Sea Act (46 U.S.C.A., §§ 1300-1315) where the shipment is in foreign trade. These statutes restrict a carrier's right to contract for exemption from liability for nondelivery of cargo, and it must follow that if nondelivery is due to a cause for which the statute imposes liability, the seller-carrier is liable notwithstanding the sale is c.i.f., and in such event may not collect freight on the goods under an earned freight clause in its bill of lading. This is not to suggest that Pope & Talbot, Inc. as carrier would be liable for the value of the lumber if it had been lost when the ship was torpedoed by enemy action. The statute does not impose liability on a carrier for loss of cargo under such circumstances. At this point we are merely discussing the matter to bring out the nature of the relationship between a purchaser and a seller under a c.i.f. sale who is also the carrier.

As in the case of a c.i.f. sale by a seller who is not also the carrier, the right of the seller-carrier to freight in the event the goods are lost or the voyage broken up will depend on the contract. A c.i.f. provision in a contract between a buyer and a seller who engages also to transport the goods sold as a carrier does not operate as an earned freight clause, or as an authorization to the seller

to ship under a bill of lading including such clause. As in the case of a carrier who is not also the seller, it is our position that where the seller under a c.i.f. sale itself agrees to transport the goods to destination as carrier, its right to freight in the event of nondelivery depends on whether it was authorized by the buyer to transport the goods under a bill of lading including an earned freight clause and on whether it has in fact done so. Fundamentally, freight is a recompense for a service performed —delivery of the goods at their destination.

> *The Tornado* (1883), 108 U.S. 342, 347, 27 L. Ed. 747;
> *Toyo Kisen Kaisha v. W. R. Grace & Co.* (C.C.A. 9, 1931), 53 F. 2d 740, 742;
> *The Gracie D. Chambers* (C.C.A. 2, 1918) 253 Fed. 182;
> *Jordan et al. v. Warren Ins. Co.,* Fed. Cas. No. 7524;
> *Robinson on Admiralty,* pp. 584-592;
> 58 *C. J.,* p. 500, § 829.

The carrier in the absence of a special agreement must complete its contract before it earns its freight. This is so even though its inability to deliver at destination arises from circumstances beyond its control.

To summarize our discussion under this heading, we would emphasize that the carrier who undertakes to transport goods sold under a c.i.f. sale, whether or not it is also the seller of the goods, is not entitled to freight in the event of failure to deliver at destination unless it has contracted for freight under such circumstances by clear and unequivocal contract. As between buyer and seller, if the carrier is not entitled to freight because it has not

contracted for it in such circumstances, or if an earned freight clause has been included in the contract of affreightment without express or implied authorization of the buyer, the buyer is entitled to a deduction from the agreed purchase price of the amount of unearned freight. In the event the inclusion of an earned freight clause in the contract of carriage was unauthorized the purchaser probably may repudiate the sale altogether.

B.

In the Event of a Conflict Between the Typewritten Provisions of the Acceptances and the Printed Earned Freight Clause in the Bills of Lading the Acceptance Provision Must Control.

Appellant contends that the Acceptance provision and the earned freight clause should be interpreted as non-conflicting. But it seems also to suggest somewhat obliquely that in any event its rights as *carrier* should not be affected by the provisions of the Acceptance, but should be determined on the basis of the bill of lading alone. In opening its argument on page 8 Appellant says:

> "There are two contracts involved: (1) a contract of sale between appellant's lumber division as seller and appellee Guernsey-Westbrook Company as buyer, the buyer obligating itself to pay the freight as part of the purchase price irrespective of delivery at destination; and (2) a contract of affreightment between the lumber division as agent for the buyer and McCormack Steamship Company Division of Appellant."

On page 21 of the Opening Brief is the following:

> "The decision in the T.K.K. [Toyo Kisen Kaisha v. W. R. Grace & Co.] as appears from the above

> quotations, stresses the marginal notations in the bills of lading that freight is 'per agreement' or 'as agreed'. No such marginal notation appears on the bills of lading in our case. The lack of such marginal notation is further evidence that Pope & Talbot, Lumber Division, was acting as seller and did not consider its *contract with the buyer* as being a part of the *bill of lading contract* subsequently made *on behalf of the buyer* with the McCormack Steamship Company Division, as carrier.
>
> "Terms in an affreightment contract cannot be used to construe terms in a sales contract. The bill of lading and the sales contract are not in conflict. If Pope & Talbot, acting as seller, performed its obligations under the sales contract, the buyer, thereafter assumed all risks and obligations including the obligation to pay the freight, and, under the earned freight clause, the carrier is entitled to retain the freight." (Italics added.)

The suggestion that the lumber division of Pope & Talbot, Inc. acted as agent for the buyer in arranging for transportation by the shipping division of Pope & Talbot, Inc. is quite artificial. Upon the execution of the Acceptances there came into existence contracts by which Pope & Talbot, Inc. agreed to sell lumber and to transport such lumber on a vessel owned by it, either the Absaroka or the West Portal. We must take issue emphatically with any suggestion that the rights of Pope & Talbot, Inc. to freight depend on the terms of the bills of lading alone. Any provision of the bills of lading which is in conflict with the special typewritten provisions of the contracts is a violation of the contracts and not binding upon Appellee Guernsey-Westbrook Company.

This is so whether the contract created by the execution of an Acceptance is to be described as a contract of sale and affreightment or as a contract of sale only, as Appellant contends. A c.i.f. contract of sale may fix the terms on which insurance is to be procured and transportation arranged. Where the seller is itself the carrier it will not, of course, be entitled to freight under an earned freight clause inserted in the bill of lading in violation of the contract of sale, and no interdepartmental division of the seller's sales and shipping functions will give it this right. In our view the inclusion by Pope & Talbot, Inc. in its bills of lading of an earned freight clause was in direct violation of the provision of the contracts: "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER".

C.

The Acceptance Provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" Means That No Freight Is to Become Due Unless the Goods Are Delivered at Destination.

(1) Well Settled Rules of Interpretation of Contracts Compel This Conclusion.

(a) A contract whereby the carrier stipulates for full freight to point of destination although he is unable to carry the goods there, should be expressed in clear and unequivocal language.

Benner v. Equitable Safety Insurance Company (1863) 88 Mass. 222, 224;

58 *C. J.*, p. 514, § 856.

If there is any uncertainty or ambiguity, a contract of affreightment, whether evidenced by a bill of lading alone or by a bill of lading plus other documents, should

not be construed as giving the carrier the right to a recompense which in its nature is for a service performed where that service has not been performed. In England the rule was established that if prepaid freight was provided for the carrier was entitled to retain it if the goods were lost without his fault.

Byrne v. Schiller (1871) L.R. 6 Exchequer 319;
Smith, Hill & Co. v. Pyman, Bell & Co. (1891) 1 Q.B. 742;
Robinson on Admiralty, p. 590, § 82.

But in this country the rule is otherwise. Only pursuant to special contract can the carrier retain freight, even prepaid freight, where the goods are not delivered at destination.

The Tornado (1883) 108 U.S. 342, 27 L. Ed. 747;
Burn Line v. U. S. & A. S. S. Co. (1908) 162 Fed. 298;
Palmer v. Lorillard, 16 Johns. (N.Y.) 348.

(b) The provision of the Acceptances for payment of freight on arrival is in language framed by Pope & Talbot, Inc., and that company's bill of lading containing the earned freight clause is a form document in the drafting of which the purchasers had no part. Hence uncertainty is to be resolved against Pope & Talbot, Inc.

Texas & Pacific Railway Co. v. Reiss (1902) 183 U.S. 621, 46 L. Ed. 358;
Grace v. American Central Ins. Co. (1883) 109 U.S. 278, 27 L. Ed. 932;
Northern Pac. Ry. Co. v. Twohy Bros. Co. (C.C.A. 9, 1938) 95 F. 2d 220, 223;

Standard Oil Co. of California v. United States, 59 F. Supp. 100, 105;

17 *C. J. S.*, 751, § 324;

12 *Am. Jur.*, 795, § 252;

Am. Law Inst. Restatement, Contracts, Vol. 1, § 236(d).

(c) The rights of the parties are to be determined with reference to the rule that in event of a conflict between written or typed provisions and printed provisions of a contract, the typed provisions control.

New York Life Ins. Co. v. Hiatt (C.C.A. 9, 1944) 140 F. 2d 752;

Deutschle v. Wilson, 39 F. 2d 406;

17 *C. J. S.*, 728, § 310;

12 *Am. Jur.*, 797, § 253;

Am. Law Inst. Restatement, Contracts, Vol. 1, § 236(e).

The Acceptance provision for payment of freight on arrival at destination is typed. The provision of the Acceptance by which the bill of lading is made a part of the contract and the earned freight clause of the bill of lading are printed.

(d) There is a further aid in the interpretation of the documents herein—the conduct of the parties under the contracts.

Holbrook v. Petrol Corporation (C.C.A. 9), 111 F. 2d 967;

Starr v. Superheater Co., 102 F. 2d 170;

17 *C. J. S.*, 755, § 325;

12 *Am. Jur.*, 787, § 249;

Am. Law Inst. Restatement, Contracts, Vol. 1, § 235.

In the oft quoted language of Lord Chancellor Sugden, "Tell me what you have done under a deed, and I will tell you what that deed means." (*Attorney-General v. Drummond*, 1 Dru. & Walsh, 353; 2 H. L. Cas. 837, as quoted in *Keith v. Electrical Engineering Company*, 136 Cal. 178, 181, 68 Pac. 598, 599). What did Pope & Talbot, Inc. do when it shipped the lumber for which it here claims full freight? It insured the freight charges in its own favor against marine risks and war risks. The pretrial order in the case in which Guernsey-Westbrook Company is plaintiff includes the following:

> "Defendant Pope & Talbot, Inc. secured sufficient marine and war risk insurance to cover all freight on all cargo on board said Absaroka on the voyage in question, all of which freight for all cargo on said vessel was approximately $80,000. The Insurance Company is contesting its obligations under the war risk insurance on all cargo on the vessel, on grounds not pertinent to the present cases." (Tr. of Rec., p. 28.)

Since Pope & Talbot, Inc. insured the freight charges in its own favor at its own expense, the implication is that it did not include insurance of the freight charges in the coverage procured for the purchasers in performance of its c.i.f. contracts. (The acceptances provided that the buyer was to insure for war risk, but this still left it the duty of the seller to obtain coverage for the buyers against marine risks.) In the absence of any explanation by Pope & Talbot, Inc. as to any other reason for procuring insurance of the freight charges in its own favor, the only reasonable inference is that it believed it would not be entitled to the freight in the event the goods did not reach their destination.

(2) The Decision in Toyo Kisen Kaisha v. W. R. Grace & Co. (C.C.A. 9, 1931) 53 F.2d 740, Is Directly in Point in Favor of Appellee's Construction.

In this case the seller and the carrier entered into an oral agreement in San Francisco, later confirmed by letter, for the shipment of nitrate of soda from a Chilean port to the seller's customer in Honolulu. Freight was to be paid at a rate per long ton, gross weight delivered. The letter read, "Freight payable in San Francisco on receipt of weights from Honolulu." The two bills of lading issued for the cargo omitted freight rates but provided that freight was "to be paid, as per margin in DESTINATION." (It appears from an examination of the record in the case (the Judgment Roll) that the provision that freight was "to be paid as per margin in" was printed and that the word "DESTINATION" was typed in the blank space following.) On one bill of lading was the typed marginal notation "Freight as per agreement", on the other "Freight as agreed." It does not appear from the opinions that these notations were directly opposite the printed earned freight clause of the bills of lading, and an examination of the record in the case reveals that they were not. The bills of lading included an earned freight clause as follows: "Said freight to be considered as earned, lost or not lost." The cargo was lost when the vessel was destroyed by fire at sea.

The contract provision in that case—"Freight payable in San Francisco on receipt of weights from Honolulu"— is certainly no clearer nor more explicit than the provision herein—"OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER." The District Court deemed the meaning of the provision in the cited case so plain that

it virtually assumed without discussion in its opinion that under it no freight was payable unless the cargo reached Honolulu. The problem was what to do about the earned freight clause of the bills of lading. The District Court disposed of that question in the following paragraph:

> "I am in accord with the contention of respondent, which is that the verbal agreement entered into and the letter confirming same written in San Francisco prior to the shipments of the nitrate from the Chilean ports constitute the agreement of affreightment, and that the bills of lading were merely receipts for the freight, given subsequently, and therefore, under the circumstances, are no part of the contract of affreightment. See Northern Pacific Ry. Co. v. American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269; The Arctic Bird (D.C.) 109 F. 167." (48 F. 2d 850, 851.)

The carrier appealed. It was contended there, precisely as it is here, that the contract provision and the earned freight clause of the bills of lading should be construed together and reconciled; that there was no conflict between them if together they were construed as making freight payable after the goods reached Honolulu, provided the voyage was not frustrated en route, but not conditional upon their arrival there. The Circuit Court of Appeals in its opinion observed that while there was authority for the District Court's holding that the bills of lading under the circumstances were merely receipts, it was not necessary thus to limit them to determine the case; that conceding the bills of lading supplemented the special contract they could not "contradict or nullify it;" that under

the special contract no freight was due unless the cargo arrived (p. 742).

Appellant attempts to distinguish that case on the ground that there the contract was between seller and carrier. Here it is between seller-carrier and buyer. But we are unable to perceive that this makes a difference. The fact is that in both cases there was an arrangement with a carrier for transportation of goods. In the T.K.K. case the arrangement was between carrier and seller. Here it is between carrier and buyer because the carrier was itself the seller. The provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" restricts the terms on which the seller as carrier may charge freight and any clause in the bills of lading in conflict with the provision is ineffective.

Appellant also contends that the T.K.K. case is distinguishable because there the bills of lading bore marginal notations: "Freight as per agreement" on one, and "Freight as agreed" on the other. The record in the case shows, however, that the notations were not placed opposite the earned freight clause of the bills of lading, and that the printed form of the bills of lading contemplated a marginal notation. It read that freight was "to be paid, as per margin in ....". Although the bills of lading in the Guernsey-Westbrook case did not bear a reference, marginal or otherwise, to the contracts of sale, sufficient has been said above, pages 15 to 17, to make it plain that any clause of the bills of lading which violated the Acceptance provision is invalid.

(3) The Cases Which Appellant Cites Are Too Unlike the Guernsey-Westbrook Case to Support Appellant.

A foreword before discussing the cases cited by Appellant—Appellant says:

> "The bill of lading and the sales contract are not in conflict." (P. 21.)

Appellant cannot escape the fact that to some extent at least, the Acceptance provision "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" is in conflict with the freight clause of the bills of lading. Under the Acceptance provision as interpreted by Pope & Talbot, Inc. it was without right to collect advance freight by including the amount thereof in the sight draft to be drawn under the contract. The freight clause, on the other hand, provides, "Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option *upon receipt of the Goods by the latter.*" (Exhibit 1 to Pre-trial Stipulation in case No. 11320.) This provision gives the carrier an option to demand that full freight be prepaid, or to include the amount of freight in the sight draft for the purchase price, but under the provision of the Acceptance Appellant would concede that the carrier has no such right.

We proceed now to analyze the cases cited by Appellant. In none of them was the seller also the carrier. In *Warner Bros. & Co. v. Israel* (C.C.A. 2, 1939) 101 F. 2d 59, the seller of sugar under a c.i.f. sale sued the buyer for a balance due on the purchase price. The quota for Philippine sugar under The Jones-Costigan Act was filled and

consequently it was necessary to place the sugar in a bonded warehouse when it arrived in New York. It is to be inferred that the sugar had been shipped freight collect as the opinion states that the seller's draft for 95% of the purchase price *less freight* had been honored. The suit evidently was for the remaining 5% of the purchase price.

The court did not consider the carrier's right to freight nor liability therefor as between buyer and seller. It would seem that the buyer must have paid the freight to the carrier to get possession of the sugar, since the opinion states that the sugar was placed in a bonded warehouse "by the defendant", who was the buyer. Doubtless the carrier was entitled to freight since it had actually delivered the sugar at New York to which it was consigned and the sugar had been discharged from the ship.

But as regards the seller, the buyer's position was that there was no delivery to him because of the governmental restrictions on the sugar, and hence that he was not liable to the seller for the balance of the purchase price. The buyer contended that the sale was not in fact a c.i.f. sale by reason of certain provisions in the contract. The contract provided that the price was to be based on several factors, including "net delivered weights"; that no sugar was to "be delivered" below 93 degrees unless on mutually satisfactory terms; and that "delivery" was to be tendered "ex-vessel" at a customary safe wharf or refinery. In rejecting the contention that by virtue of these provisions the sale was not a c.i.f. sale, the court said that these provisions dealt ". . . only with an adjustment of the purchase price and with a condition of the contract of affreightment to be arranged by the seller whereby the

carrier should take the sugar to a suitable discharging point to be designated by the buyer. They must be read in their context with the other terms of the contract and given such effect as the contract as a whole shows that the parties intended.'' (P. 61.)

The references to delivery in the Warner Bros. contract plainly did not mean that as between buyer and seller delivery to the buyer at destination was a condition precedent to the buyer's liability for the purchase price less freight. As has been said, the action concerned the seller's right to the purchase price, less freight. There was no provision postponing payment of the purchase price until arrival of the goods. There is such a provision in the Guernsey-Westbrook contract as concerns the freight, the provision ''OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER''.

In *Boston Iron & Metal Co. v. Rosenthal* (1945) 68 Cal. App. 2d 564, 156, P. 2d 963, a contract for the sale of scrap steel provided:

> '' 'Price: Thirty Dollars ($30.00) per gross ton, delivered Japan. Shipment: During month of May, June, July, August, 1937. Terms: All payment to be cash against the following documents: Certificate of weight, Mate's receipt that he has received the weight on the ship, prepaid freight bills, and invoices in duplicate. Remarks: Material to be loaded in vessel, insurable, under the nominal rates of insurance. Proper destination as to port delivery will be furnished upon advice as to the amount of tonnage you are ready to ship.' Under Boston Company's signature appears: 'Accepted: C. & F. Japan Accepted Ports. Wm. Rosenthal.' ''

The purchaser brought an action to recover an alleged overpayment to the seller due in part to a shortage in weight of the scrap steel as delivered in Japan. The trial court had found that material of the weight shown on the shipping documents had actually been loaded, but that there was a shortage on arrival in Japan. It was held that the general rule applied that when nothing is stated as to place of delivery, delivery is complete to the buyer when made to a common carrier; that the provision "Thirty Dollars ($30.00) per gross ton, delivered Japan" merely meant that the price was a "delivered Japan" price and did not indicate the point of delivery or where title was to pass. Accordingly, the cargo was at the risk of the purchaser during transportation and it could not recover for the shortage.

The express provision of the contract, quoted above, made it plain that payment of the purchase price, including freight, was not conditional on delivery of the material in Japan. Payment was to be cash against a certificate of weight, the Mate's receipt that he had received the weight on the ship, prepaid freight bills and invoices in duplicate. Thus payment was due on arrival of documents, the transmission of which most likely would be by faster means than the steel was being transported. The case, therefore, is distinguishable as concerns the liability for freight from the present case where freight was not to be paid until arrival of the cargo.

In *Pond Creek Mill & Elevator Co. v. Clark* (C.C.A. 7, 1921) 270 Fed. 482, a Chicago flour broker sued a milling company at Pond Creek, Oklahoma, for failure to make shipments under contract. The question was whether the

Illinois or Oklahoma statute of limitations applied. The contract was made in Oklahoma and if it also was to be performed there the Oklahoma statute barred the action. The court held that the contract was to be performed in Oklahoma, on the theory that delivery to pass title to the buyer would have taken place there upon delivery to the common carrier for shipment had the seller performed its contract. The court so held although the prices were specified to be net to the seller "in bulk basis Chicago". The court found the transaction analogous to that which takes place where a seller located in one place ships goods from there under a contract wherein the price is stated to be f.o.b. another place, which may or may not be the destination. Delivery to the buyer is complete when made to a common carrier at the place where the seller produces the goods or has them for sale. But from the agreed price there is to be deducted freight to the f.o.b. point (where the carrier collects freight from the buyer) regardless of the place to which the goods are actually shipped. Thus, if flour sold at a price f.o.b. Chicago were shipped from Pond Creek, Oklahoma, to Detroit, Michigan, there would be deducted from the stipulated purchase price an amount sufficient to pay freight from Pond Creek to Chicago and the purchaser would pay only for transportation beyond Chicago.

In the cited case liability for the purchase price undoubtedly would attach upon delivery to the carrier in Pond Creek, although the seller was to bear freight charges to Chicago. But this does not mean that had the contract provided that the price was to be paid upon or after arrival at Chicago that liability would have attached

before the flour reached there and would not have been dependent on its arrival there.

In *Meyer v. Sullivan* (1919) 40 Cal. App. 723, 181 P. 847 wheat was sold in 1914

> ". . . for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar, forty three & one-third cents ($1.43⅓) per 100 lbs. f.o.b. Kosmos steamer at Seattle, with the usual official certificate of the grain inspector to accompany the draft on us from the north."

Due to war conditions the Kosmos Line cancelled its sailing schedule and the seller thereupon refused to fulfill its contract. The buyer was willing to accept delivery at the warehouse on the dock where Kosmos steamers customarily loaded or at any other warehouse in the Seattle harbor. In affirming judgment for the buyer for breach of contract, the court pointed out that the f.o.b. clauses were used in connection with a price; that in view of a well established custom in the trade the place of delivery contemplated was the dock where Kosmos steamers customarily loaded, not the deck of the vessel itself. The court further held, in line with the decision of the trial court, that if defendants were obligated to transfer the wheat from the dock to the deck of a Kosmos vessel the provision was for the benefit of the buyer who could and had waived it.

Had this action been one by the seller for the purchase price, it doubtless would have been held that the purchaser became liable for the price upon delivery of the grain at the dock, for the case was not one where payment of the purchase price was postponed beyond the time the grain was placed on the dock. The contract did not pro-

vide for payment of the purchase price on arrival of the steamer at destination.

In *Goodyear Tire & Rubber Co. v. Northern Assurance Co.* (C.C.A. 2, 1937) 92 F. 2d 70, the question was whether an insurance policy covered crude rubber destroyed by fire after being unloaded onto a dock at New York City, and this depended upon whether title to the rubber had passed from the seller to the buyer, who was the assured. The contract provided:

> "Terms: Net cash 30 days from date of delivery at New York City.
>
> "F.O.B.: Cars New York City."

The insurance company unsuccessfully contended that the goods were at the risk of the seller until placed on cars in New York City. The court said that the f.o.b. provision placed under the heading "Terms" rather than "Place of Delivery" had relation to price and indicated that the cost of loading on cars was to be borne by the seller, "but the loading was not to affect the time when the purchase price was to be paid, namely, '30 days from date of delivery at New York City.' "

This decision would seem to support Appellee Guernsey-Westbrook Company in its construction of the phrase "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" rather than Appellant, for the clear implication of the decision is that delivery upon the dock at New York City was a condition precedent to liability for the purchase price.

In summary of the decisions upon which Appellant relies we would say that in none of them was the seller also the carrier. The cited cases are relevant to the

question as to when liability for the purchase price attaches as between buyer and seller. The present case concerns liability of the buyer to the seller-carrier for freight. The cited cases indicate that the fact that the purchase price is stated to be "delivered" at destination (e.g. "delivered Japan") or f.o.b. a named place beyond the point of shipment, does not necessarily mean that as between buyer and seller delivery occurs and liability attaches at that place. Title may pass and liability for the purchase price attach as of an earlier time, as upon delivery by the seller to a common carrier for shipment. From these *purchase price* cases Appellant argues that liability of Guernsey-Westbrook Company for *freight* attached before the lumber reached New York, by which Appellant must mean that it attached as soon as transportation commenced. Admittedly, liability of Guernsey-Westbrook Company for 98% of the purchase price less freight attached prior to the arrival of the steamer at destination. But the provision as to payment of freight was "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER".

In none of the cited cases, except *Goodyear Tire & Rubber Co. v. Northern Assurance Co., supra,* which we regard as in our favor, was there a provision postponing the time of payment until arrival of the goods. For example, in *Boston Iron and Metal Co. v. Rosenthal, supra,* the provision was not that the price was to be paid on delivery in Japan, or on arrival of the goods in Japan. The price was payable cash against documents. The buyer is obligated to pay the price on tender of the documents without awaiting the arrival of the goods. (1 *Williston on Sales* (2d ed.) p. 606; *Vold on Sales,* p. 216; 32 *Yale Law Journal* 716.)

Furthermore, liability for the purchase price as between buyer and seller for goods which have passed out of physical control of the seller is a different matter from liability of the buyer to a carrier for freight on goods which the carrier has engaged to transport. The general rule is that "if, in a contract for purchase and sale of goods to be shipped to a given point, nothing is stated as to the place of delivery, the delivery to the buyer is complete when it is made to the common carrier at the place where the seller produces them or has them for sale." (*Boston Iron and Metal Co. v. Rosenthal,* 68 Cal. App. (2d) 564, 568, 156 P. 2d 963, 965; 1 *Williston on Sales* (2nd Ed.), Section 280h, p. 623; *Pond Creek Mill & Elevator Co. v. Clark,* 270 F. 482, 486.) But it is not the rule that liability for freight attaches in favor of the carrier when the carrier takes possession. On the contrary, the carrier must perform the service of transportation to earn its freight in the absence of a clear and unambiguous contract giving it the right to freight in the absence of performance of the service which is the consideration for the freight. For these reasons, the cases upon which Appellant relies do not support its position that freight became due although the lumber did not arrive at Brooklyn, New York. Rather, *Toyo Kisen Kaisha v. W. R. Grace & Co., supra,* squarely supports the position of Appellee Guernsey-Westbrook Company. There, as in the present case, the action involved a carrier's right to freight under a contract provision by which freight was to be paid on arrival of the goods at destination.

II.

THE ABANDONMENT WAS NOT JUSTIFIED

Pope & Talbot, Inc. cannot succeed in either of these actions unless it was justified in abandoning the voyage on February 5, 1942. The conclusions of law in the Guernsey-Westbrook Company case include the following:

> "There was no commercial frustration of the voyage of the steamship Absaroka from St. Helens, Oregon, to Brooklyn, New York, which justified the abandonment of the voyage at Los Angeles." (Tr. of Rec., p. 54.)

There was a similar conclusion of law in the Blanchard Lumber Company case (Apostles on App., p. 38).

It is true that paragraph 7 of the bills of lading herein gives the carrier broad powers and wide discretion. That clause provides:

> ". . . If because of conditions, actual or reported, at or near or between the port of loading and/or the port of discharge such as war, hostilities, . . . blockade, . . . or any regulations of any government . . . or any condition whether of like nature to those named or otherwise and whether existing or anticipated, which may cause the Master to decide that it is unsafe or impracticable to proceed from or to any port . . . or that the loading or discharging or carriage of the cargo is likely to be delayed . . . then the vessel may, at its option . . . store the goods ashore . . . at the port or place where the vessel then is . . . all at the risk and expense of the goods, their shipper, owner and consignee. Any such disposition of the goods shall constitute a final delivery thereof . . . ., but the Carrier shall retain a lien on the goods for all proper charges . . ."

But such a clause is not to be construed to place a shipper at the mercy of a carrier acting in self-interest alone. Of course it is to the economic advantage of the carrier to be able to "earn" the freight without transporting the cargo to destination. But "such a clause must be given a reasonable interpretation, and the discretion conferred may not be exercised in an arbitrary or unreasonable manner, nor without substantial grounds, nor will good faith alone suffice." (*The Wildwood* (C.C.A. 9, 1943) 133 F. (2d) 765, 767.) It may well be that such a provision as clause 7 of the bills of lading will protect a carrier from liability for damages for what would otherwise be a breach of contract under circumstances which will not, however, give it a right to claim full freight under a "goods or vessel lost or not lost" clause for a voyage not completed.

A.

The Possibility of Requisition of the ABSAROKA by the Government Was Not a Ground of Abandonment

The District Court found:

> "The defendant did not base its decision to abandon the voyage upon the possibility that the vessel would be requisitioned by the War Shipping Administration. The Absaroka was not suitable for a troopship and in the opinion of defendant was not vitally needed by the War Shipping Administration at the time when the voyage was abandoned. The defandant had not been advised that the Government required the Absaroka when it abandoned the voyage on February 5, 1942." (Finding X, Tr. of Rec., p. 53; Apostles on App., p. 38.)

Mr. Lunny, vice-president of Pope & Talbot, Inc., who made the decision to abandon, testified that he took such action because the company could not determine how long it would take to complete the repairs, that the date when the vessel would be ready was a matter of conjecture and could well be "a matter of months and months." (Tr. of Rec., p. 95, p. 102.) The witness did not give as additional reasons intensification of the submarine menace or the possibility of requisition, although he was examined as to those matters. As to the possibility of requistion, he testified:

> "No one could say what the condition would be at the time she was repaired. She may well have continued on her voyage." (Tr. of Rec., p. 100.)

Here we have the admission of the witness who made the decision to abandon that it was not known at the time whether the government would requisition the vessel, that the ship was not of the type "vitally needed at that time" (Tr. of Rec., p. 104). In fact the government in effect requisitioned the vessel as of the time she should be repaired by a wire of April 14, 1942 from the War Shipping Administration (Tr. of Rec., p. 108), but the justification is to be determined as of the time of the abandonment rather than upon the basis of subsequent events. (*The Styria* (1902) 186 U.S. 1, 13, 22, 22 S. Ct. 731, 736, 739; *The Wildwood,* 133 F. (2d) 765, 767.) Furthermore, the abandonment of the voyage left the Absaroka free of commitments. It is possible the government might have postponed the effective date of its action to permit the ship, when repaired, to complete its pre-existing contracts.

B.

Possible Increase of the Submarine Menace Was Not a Ground of Abandonment

The District Court found:

> "The danger from submarine attacks to a vessel bound on an intercoastal voyage existed at the time that the steamship Absaroka sailed from St. Helens, Oregon, on this voyage. Defendant was aware of that danger at the time that the vessel sailed. Defendant did not know on February 5, 1942 what situation would exist with respect to danger from submarine attack at the time when the repairs to the vessel would be completed. Since defendant expected the voyage to be delayed for an indefinite period, it was highly speculative what, if any, menace would exist at the time the voyage could be resumed. Defendant based its decision to abandon the voyage primarily on delay." (Finding IX, Tr. of Rec., p. 52; Ap. on App., p. 37.)

The danger from enemy submarine activity would have to be substantially greater than when the Absaroka sailed to justify abandonment on that ground, and the increase unforeseen (*The Wildwood* (C.C.A. 9, 1943) 133 F. 2d 765, 767, 768). The Absaroka was not loaded nor did she sail until after Pearl Harbor. She was loaded on or about December 13. She did not sail until December 18 (Tr. of Rec., p. 23-24; Apostles on App., p. 26-27).

It is a well known fact that before we entered the war, Germany had been carrying on a vigorous and disastrously effective submarine campaign in the Atlantic and the Caribbean. With our entry into the war, Germany's submarines, already cruising in the waters off our coasts, could

and did immediately extend their activities to include the ships of this country. That Germany would do this was, of course, to be anticipated and was, in fact, anticipated by Pope & Talbot, Inc. Mr. Lunny testified that his company took precautions to minimize the hazard by following directions of the War Shipping Administration and the Navy, such as painting the ship and the deckload (Tr. of Rec., p. 89). On the morning of Pearl Harbor, Mr. Lunny placed war risk insurance on all vessels of Appellant and all cargoes (Tr. of Rec., p. 107).

Mr. Lunny was well aware of the submarine menace when the Absaroka sailed. He testified that there was a submarine campaign in the Atlantic against the English and the French before we were in the war; that a great number of English and French ships were lost in the Atlantic before we entered the war; that he was watching the shipping during all this time, and although he was unable to testify to the number of British ships lost in 1941 before we were in the war, there were "a mass of figures" in the office of Pope & Talbot, Inc. (Tr. of Rec., p. 105-107). He also testified that the torpedo boat campaign was being waged against British and French shipping in the Caribbean before we were in the war (Tr. of Rec., p. 108).

The presence of Japanese submarines so close to our west coast so shortly after the attack on Pearl Harbor came as somewhat of a shock to many persons but, in view of the nature of the attack, indicating as it did cunningly calculated advance preparations, coastal submarine activity can scarcely be said to have been of such an unforeseeable nature as to warrant the abandonment of a voyage undertaken after the Pearl Harbor attack. Furthermore, having

embarked upon a voyage which would take the ship through Atlantic waters, which Appellant knew to be submarine infested, it is scarcely a ground for abandonment that, as it turned out, the same menace was lurking in Pacific waters.

It should also be said with reference to the claim of abandonment because of increased submarine activity, that any decision based on that factor, and Mr. Lunny did not testify that he based his decision thereon, should have been postponed until the repairs were completed. Cases where vessels have turned back while on the high seas because of apprehension of seizure or destruction through enemy action do not present a situation analogous to that involved in the present cases (*The Wildwood,* supra; *The Kronprinzessin Cecilie,* 244 U.S. 12, 61 L. Ed. 960. See notes 137 A.L.R. 1199, 1206, 1241, and 147 A.L.R. 1273, 1282). In *The Wildwood* and *The Kronprinzessin Cecilie,* and other cases which might be cited, present action was called for to meet an emergency which was reasonably conceived to be urgent. These ships were on the high seas. Here we have the Absaroka, an American vessel, undergoing repairs in an American port. In such a situation, the state of submarine activity on the possibility of requisition were matters to be considered when the vessel should be ready to sail upon completion of the repairs.

C.

Uncertainty as to When the Repairs Would be Completed Was Not a Ground of Abandonment

The trial court found:

> "Defendant based its decision to abandon the voyage primarily on delay." (Finding IX, Tr. of Rec., p. 52; Apostles on App., p. 37.)

The court further found:

> "The abandonment of the voyage on February 5, 1942 was based primarily upon the ground that it could not be determined how long it would take to repair the steamship Absaroka, and that because the lumber was damaged by water and oil, and because the Coast Guard and the Navy would not allow it to remain piled high and defendant did not have labor enough to pile it properly, it would have deteriorated over a period of months due to 'burning' or dry rot and would have been likely to warp; that due to the fire hazard it was necessary to employ a watchman, which made the storage charges high." (Finding XI, Tr. of Rec., p. 53; Apostles on App., p. 38.)

In the case of *Admiral Shipping Company, Limited v. Weidener Hopkins & Co.* (1916) 1 K.B. 429, 436, often cited in connection with the doctrine of commercial frustration, it was said:

> "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable *is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract,* and for the accomplishment of which object or objects the contract was made." (P. 436. Italics added.)

Thus the delay must be inordinate or unreasonable to work a commercial frustration. It is our position that

the reasonableness of the delay in prospect must be determined with reference to the provisions of the contract. Time was not of the essence thereof. On the contrary, the bills of lading provided:

> "Carrier is not and shall not be required to deliver said packages at the port of discharge or port of destination at any particular time, or to meet any particular market, or in time for any particular use." (Paragraph 9.)

Here the seller-carrier's reservation of a right to make delayed delivery would seem to imply a correlative right in the purchaser to insist that such delivery be made or, at least, that it is not liable to pay freight, a recompense for delivery, under an earned freight clause where such delivery is not made. The fact that the purchasers wished delayed delivery, as evidenced by their protesting the abandonment, is an important factor. In making a decision to abandon, the interests of all concerned must be weighed. (*The Styria* (1902) 186 U.S. 1, 22 S. Ct. 731.)

Concerning this matter the trial court aptly said:

> "Plaintiffs reasonably contend that the right to complete the voyage despite delay carried with it a correlative duty to carry out the contract despite delay, in the absence of extraordinary circumstances. Plaintiffs indicated by their objection to the abandonment a willingness to accept delayed shipments. There is no showing that the purposes of the contract would be frustrated by a indefinite delay. Also, Bethlehem Steel Company tendered defendant its offer for repairs on January 22, 1942, and the repair contract was negotiated. The repairs were actually completed on May 9, 1942. There are not sufficient facts to justify defendant's determination, of which notice

was given on February 5, or two weeks after the offer for repairs, that there would be such an inordinate delay in repairing the vessel as to justify an abandonment." (Tr. of Rec., p. 43.)

D.

The Condition of the Lumber Did Not Justify the Abandonment

Mr. Lunny testified that some of the lumber was oil stained, some of it damaged by salt water (Tr. of Rec., p. 97). He also testified that due to shortage of labor and Coast Guard restrictions limiting the height to which the lumber could be piled, it was so stacked that some of it was likely to "burn", that is, develop dry rot, and also to warp, and that the Coast Guard was desirous of getting the lumber off the dock because it was a fire hazard. (Tr. of Rec., p. 96, p. 99.) This is relied on by Pope & Talbot, Inc. as further supporting its decision not to hold the lumber shipment until the Absaroka should be repaired. However, the bills of lading in paragraph 3 provided, "Full freight and charges shall be payable, and so paid, on all damaged and unsound goods." The carrier would have had this right for freight on goods damaged by causes beyond its control, without express reservation *Jordan et al. v. Warren Insurance Co.*, Fed. Cas. 7,524; *Robinson on Admiralty*, p. 584, § 82). But the existence of this right would seem to dictate a correlative obligation on the carrier to deliver the damaged goods when the consignee is unwilling that the voyage should be abandoned or, at least, that the carrier if it does not deliver them, should not be entitled to "earned" freight to point of delivery.

It was not for Pope & Talbot, Inc. to make a unilateral

decision on the basis of the above factors. Concerning this matter the District Court in its opinion said:

> "In The Bohemia, 38 F. 756, 758, an action involving damage to a cargo of potatoes during quarantine, the court said, 'It is the general rule of the maritime law that in extraordinary circumstances, the master shall consult the shipper or consignee, where practicable, as respects his interests.' *I think that since plaintiffs were willing to risk deterioration of the lumber, defendant may not rely on the possibility of such deterioration as a ground of abandonment.*" (Tr. of Rec., p. 44. Italics added.)

If the Coast Guard and the Navy deemed the lumber a fire hazard on the dock it could have given official notice to move it. As to the storage charges and expense of keeping a watchman, it would seem that under Paragraph 7 of the bills of lading such charges would be borne by the purchasers.

Appellant has cited a number of cases in which an abandonment was held to have been justified. None are analogous on their facts to the present cases.

In *Allanwilde Transport Corp. v. Vacuum Oil Co.* (1919) 248 U.S. 377, 63 L. Ed. 312, in *International Paper Co. v. The "Gracie D. Chambers"* (1919) 248 U.S. 387, 63 L. Ed. 318, and in *The Malcolm Baxter, Jr.* (1927) 277 U.S. 323, 72 L. Ed. 901, sailing vessels were prevented from leaving port by the government's refusal of clearance to sailing vessels bound for the war zone. In *Standard Varnish Works v. The "Bris"* (1919) 248 U.S. 392, 63 L. Ed. 321, the vessel did not leave port because the government required a license to ship cargo to Gothenburg, Sweden and the license was refused.

In *Portland Flour Mills Company v. British & F. M. Insurance Company* (C.C.A. 9, 1904) 130 Fed. 860, the ship stranded and was abandoned as a total loss. In *Texas Co. v. Hogarth Shipping Corp.* (1921) 256 U.S. 619, 65 L. Ed. 1123, in *The Claveresk* (C.C.A. 2, 1920) 264 Fed. 276, and in *Bank Line, Ltd. v. Arthur Capel & Co.* (1919) A.C. 435, 14 Asp. M. C. 370, there was a requisition.

In *The Wildwood* (C.C.A. 9, 1943) 133 F. 2d 765, an American ship from a New Jersey port bound for Russia turned back on March 28, 1940 after reaching Honolulu and returned to Tacoma, Washington, upon news of British seizure of a Russian ship en route from San Francisco to Russia with similar cargo of copper bullion. The consensus of news reports at the time, which the carrier's officials in this country were following, was that the British blockade had been extended. In *The Kronprinzessin Cecilie* (1916) 244 U.S. 12, 61 L. Ed. 960, a German vessel bound from New York for Plymouth, England, and Cherbourg, France, turned back to New York in 1914 upon grave apprehension of war between England and Germany and fear of seizure.

In *The Styria* (1902) 186 U.S. 1, 22 S. Ct. 731, an Austrian steamship sailed from Trieste via Sicilian ports to New York carrying a quantity of sulphur. The master, on learning that war had broken out between Spain and the United States, unloaded the sulphur in Sicily because it was a contraband of war. In *M. A. Quina Export Co. v. Seebold* (C.C.A. 5, 1923) 287 Fed. 626, a charter was entered into after outbreak of war in 1914. It was held, however, that Germany's subsequent declaration of unrestricted submarine warfare was an extraordinary oc-

currence which justified the owner in refusing to perform the charter.

In *Admiral Shipping Company, Limited v. Weidener Hopkins & Co.* (1916), 1 K.B. 429, 13 Asp. M. C. 246, a vessel was loading at a Baltic port when war broke out in 1914. She was not allowed to leave the Baltic by Russian authorities.

In *Jackson v. Union Marine Insurance Co.*, 31 L. T. 789, 2 Asp. M. C. 435, a vessel under charter left Liverpool on January 2, 1872 for Newport. Here she was to load a cargo of rails for San Francisco. She ran aground January 3 and got off February 18. It was estimated that repairs could have been completed by July 1. The charterer threw up the charter and hired another ship. It was held that he was justified. But in this case the charter provided that the vessel was to sail "with all possible dispatch". It did not contain a provision such as that in the bills of lading herein providing for delayed delivery.

III.

THE EARNED FREIGHT CLAUSE WAS OPTIONAL

We have said above (page 3) that Appellees' contention that the earned freight clause is an optional one remains in these cases on appeal. For the reason that Appellant has mistakenly taken the position that Appellees' contention in this regard is not involved on this appeal, it has given no consideration to the question in its opening brief. In its brief in the trial court Appellant stressed the fact that earned freight clauses are in quite general use and cited a number of cases involving such clauses. That earned freight clauses are common

we agree. The court commented upon their frequent use in *Mitsubishi Shoji Kaisha v. Societe Purfina Maritime* (The Laurent Meeus) (C.C.A. 9, 1943) 133 F. 2d 552, 558. But we do not concede that the clause in the bill of lading used by Pope & Talbot, Inc. is a typical one. It provided:

> "Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier at its option upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost; . . . ." (Exhibit 1 to Pre-trial Stipulation in Case No. 11320 and Case No. 11321.)

In three of the six cases cited by Appellant in this connection in its brief in the trial court the earned freight clause related to prepaid or advance freight.

In *Int. Paper Co. v. The "Gracie D. Chambers"* (1919) 248 U.S. 387, 391, 63 L. Ed. 318, the clause read:

> "Freight for said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost."

In *Standard Varnish Works v. The "Bris"* (1919) 248 U.S. 392, 397, 63 L. Ed. 321, the clause was as follows:

"Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere; . . .".

In *Mitsubishi Shoji Kaisha v. Societe Purfina Maritime, supra,* the provision related to freight payable on telegraphic advice of signing bills of lading as follows:

"The freight to be paid in cash in New York less 1% discount on telegraphic advice of signing Bills of Lading and is to be considered earned and not returnable ship and/or cargo lost or not lost." (133 F. 2d 552, 554.)

Examples of earned freight clauses not limited to prepaid or advance freight were considered in the following cases:

Transmarine Corp. v. R. W. Kinney Co. (1932) 123 Cal. App. 411, 413, 11 P. 2d 877, 878. The clause read:

"It is hereby expressly agreed that the freight (as stated herein) whether prepaid by the Shipper or to be collected at destination, becomes wholly due and belongs absolutely to the Carrier upon receipt of the goods into the custody of the Carrier or its agents, and if prepaid is not to be returnable, and if collect, is payable ship and/or cargo lost or not lost."

Portland Flour Mills Company v. British & F. M. Insurance Company (C.C.A. 9, 1904) 130 Fed. 860, 863, involved a shipment of flour for Hongkong. The bill of lading provided:

> "The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit."

Pope & Talbot, Inc., upon the trial of these cases read into the record the earned freight clause in the form bill of lading used by the War Shipping Administration. The intent that the provision should apply to collect freight as well as prepaid or advance freight is clearly expressed as follows:

> "Freight shall be payable on actual gross intake weight or measurement or, at carrier's option, on actual gross discharge weight or measurement . . . Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be intended to be prepaid or to be collect at destination; and the carrier shall be entitled to all freight and charges due him, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up as abandoned." (Tr. of Rec., p. 84.)

We quote the above provisions for the purpose of demonstrating that although earned freight clauses have wide currency there is a great variation in terms, and the interpretation of each such clause must depend on its own peculiar wording. That earned freight clauses as applied to collect freight are by no means so common as earned freight clauses relating to advance or prepaid freight, is indicated by the fact that Robinson in his text on Admiralty, published in 1939, states that frequently "the shipping papers provide that prepaid freight shall be at the risk of the voyage" (p. 591), without noting that

such clauses are sometimes also drawn to apply to collect freight. The treatment of the subject in Poor on Charter Parties and Ocean Bills of Lading (2d ed., 1930) page 71, is similar. (See also *De La Rama S.S. Co. v. Ellis* (C.C.A. 9, 1945) 149 F. 2d 61, where the form bill of lading of the Far Eastern Conference group of carriers is set forth. It relates to prepaid freight. See also *The Louise* (Md. 1945) 58 F. Supp. 445, 448.)

Pope & Talbot, Inc. also cite *Allanwilde Transport Corp. v. Vacuum Oil Co.* (1919) 248 U.S. 377, 382, 63 L. Ed. 312, which involved shipments by two different shippers on the same vessel. As to one of them there was a charter party providing as follows:

> "... freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

The bill of lading for the shipment included the following:

> "All conditions and exceptions of charter party are to be considered as embodied in this bill of lading."

The bill of lading for the other shipment which was not under charter party provided:

> "Full freight to destination, *whether intended to be prepaid or collect at destination,* and all advance charges ... are due and payable to (the Allanwilde Transport Corporation) upon receipt of the goods by the latter; ... and any payments made ... in respect of the goods ... shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder without deduction (if unpaid), or refunded in whole or

in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up; . . ." (Underlining added.)

Freight was in fact paid in advance on both shipments. The clause last quoted is more similar in some respects to that used in the form of Pope & Talbot, Inc. than are the provisions in the other cases cited, but observe that the phrase "whether intended to be prepaid or collect at destination" is not included in the form of Pope & Talbot, Inc. Nor does the provision open with an optional phrase such as that in the form of Pope & Talbot, Inc.

We do not go to the extent of contending in these cases that the clause in the form of Pope & Talbot, Inc. may apply only to prepaid or advance freight. Rather it is our position that the clause is an optional one, that it applies only where the carrier has exercised the option to declare the freight due and payable before the event relied on as terminating the voyage short of destination. In the case of Guernsey-Westbrook Lumber Company, Pope & Talbot, Inc. by the provision of its Acceptances had expressly precluded itself from exercising an option to demand the freight before arrival at destination. In the Blanchard Lumber Company case there was no such contract, but in fact Pope & Talbot, Inc. had shipped the lumber collect and had not before its decision to abandon the voyage in February, 1942, attempted to exercise an option to declare the freight due and payable (Tr. of Rec., p. 27; Apostles on App., p. 29). Both as to the Guernsey-Westbrook Company and the Blanchard Company, therefore, it is our position that in the circumstances shown the earned freight clause never became operative.

We need not reiterate the rules of interpretation which dictate that any uncertainty or ambiguity should be resolved against Pope & Talbot, Inc.

This construction does not overlook the fact that the clause provides not only that there shall be no refund of freight paid, but also for payment of unpaid freight without deduction. There is scope for application of this provision under the construction for which we contend. The carrier by a demand for payment may exercise an option to require payment of the freight before arrival at destination, where such an option does not contravene the agreement of the parties. But the demand may not have been met when vessel and cargo are lost, in which event freight is due under the clause notwithstanding non-delivery.

We have heretofore referred to the English rule under which the carrier was entitled to freight in the event the voyage was lost without his fault where the contract provided for prepaid freight without the necessity for a special earned freight clause.

In *Smith, Hill & Co. v. Pyman, Bell & Co.* (1891) 1 Q. B. 742, a charter party contained the clause, "One-third freight, if required, to be advanced, less 3 per cent for interest and insurance." The shipowner did not attempt to require payment of freight until after the cargo had been lost. Recovery was denied. The shipowner had an option to require payment of advance freight. The requiring of payment was said to be a condition precedent to the obligation to pay. An enforceable demand could not be made after the cargo was lost.

CONCLUSION

We maintain that Appellee Guernsey-Westbrook Company is not liable for freight for the reason that the contracts between it and Appellant Pope & Talbot, Inc. made the Guernsey-Westbrook Company's liability dependent on arrival of the lumber at destination. *Toyo Kisen Kaisha v. W. R. Grace & Co.* (C.C.A. 9, 1931) 53 F. (2d) 740, is direct authority for the contention of Appellee Guernsey-Westbrook Company that the provision in the Acceptances "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER" means that freight is not due unless the lumber is delivered at destination. In the event of a conflict between the Acceptance provision and the bill of lading the provision in the Acceptance controls.

Appellee Guernsey-Westbrook Company is not liable for freight for the additional reason that the earned freight clause is an optional one and applies only where the carrier has exercised an option to declare the freight due before the voyage is abandoned. Under the terms of Acceptances Pope & Talbot, Inc. was without right to exercise an option to declare freight due and payable from Guernsey-Westbrook Company before arrival at destination because the Acceptances provided "OCEAN FREIGHT NET CASH ON ARRIVAL OF STEAMER."

The argument that the earned freight clause is an optional one applies also in the case in which Blanchard Lumber Company is libelant. As to that company the lumber was in fact shipped collect, and Pope & Talbot, Inc. had not prior to its declaration of abandonment exercised an option to declare the freight immediately due and payable. In the circumstances the earned freight clause

never became operative as to it. Hence no freight is due from Blanchard Lumber Company.

In any event a carrier has no rights under an earned freight clause where it unjustifiably abandons the voyage. The trial court has sustained Appellees in their contention that the abandonment was not justified. The judgment in Case No. 11320 and the decree in Case No. 11321 should be affirmed.

Respectfully submitted,

Farnham P. Griffiths
Charles E. Finney
Martha T. Naylor
McCutchen, Thomas, Matthew,
Griffiths & Greene
Attorneys and Proctors for Appellees.